HIGH COURT OF UTTARANCHAL AT NAINITAL

Criminal Jail Appeal No. 1854/2001

Ajay Bangali
S/o Surendra Rai
Purani Mandi, Kichha
District U.S. Nagar .....Appellant

Versus

State of Uttaranchal ……Respondent

Ms. Krishi Shukla learned Amicus Curiae.
Sri G.S. Sandhu learned A.G.A.

Delivery of Judgment:- 7th August, 2004

Hon'ble J.C.S. Rawat, J.

This criminal appeal was received from jail.

2. The appellant was convicted and sentenced to undergo RI for ten years under section 20 of the N.D.P.C. Act (for short 'Act') and further sentenced to pay fine of Rs.1,00,000/- (Rupees one lakh only) by the learned District Judge, Udham Singh Nagar in Special S.T. No. 121/1999.

3. The case of the prosecution, in brief, are that on 23.6.1999 Virendra Kumar-S.I. (PW-1) alongwith police personnel was checking about the vehicles and suspected persons at Majola, Chauki Barrier at about 5:20 P.M. They saw the appellant riding on the scooter coming from Khatima and he was asked to stop the scooter but he tried to escape. The appellant could not control over the scooter and fell down near the police barrier. The police party intercepted the appellant and tried to conduct a search. The appellant was duly informed of his right of being searched before a Gazetted Officer or a Magistrate as required under section 50 of the Act but he declined that offer. On conducting search of the appellant 100GM Charas was recovered from his pocket. The recovered Charas was sealed at the spot and prepared the recovery memo Ex.ka.1. It was disclosed by the appellant that the said scooter in which he was riding was stolen from Rudrapur few day ago. On the basis of recovery, check FIR (Ex.ka.2) was lodged at the police station and entry to that effect was made in the

G.D. (Ex.ka.3). The investigation was entrusted to Virendra Kumar-S.I. (PW-1), who prepared the site plan (Ex.ka5) and alleged Charas was sent to Agra for chemical examination and on receipt of its report (Ex.ka9) it was found that it was Charas. The investigation was taken up as usual which culminated into the submission of the chargesheet.

4. The charge under sections 20 of the N.D.P.S. Act was framed by the learned Sessions Judge against the appellant. The appellant denied the charges and claimed the trial.

5. In order to prove its case, the prosecution examined six witnesses. S.I. Virendra Kumar (PW-1) and Constable Balkrishan (PW-2). They proved the factum of recovery of Charas and scooter as stated above. S.I. Surendra Kumar (PW-1) has also stated that he informed about the incident to his superior and information of which was recovered in the G.D. on 23.6.1999 and on the basis of which the case was registered against the appellant. Constable Nandan Singh (PW-3) deposed that he lodged check FIR (Ex.ka.2) and entry to that effect was made in the G.D. (Ex.ka.3). He further stated that he deposited the sealed packet of Charas in the Malkhana. Harish Ram (PW-4) was posted at the police station Khatima on 23.6.1999 and he recovered the Rawangi of constable Balkrishan. Anant Ram Singh (PW-5) who took the investigation as usual which culminated into the submission of the chargesheet. Constable Budhpal Singh (PW-6) also supported the prosecution version.

6. The learned Session Judge on the basis of his appreciation of the evidence in the case held that the prosecution had proved its case against the appellant beyond reasonable doubt and sentenced him to undergo RI for ten years under section 20 N.D.P.S. Act and further sentenced to pay fine of Rs.1,00,000 (Rupees one lakh only).

7. I have heard Ms. Krishi Shukla learned Amicus Curiae for the appellant and Sri G.S. Sandhu learned A.G.A. I have also gone through the evidence and material on record.

8. The learned Amicus Curiae for the appellant contended that the presence of Constable Balkrishan (PW-2) at the spot is doubtful and further contended that Constable Balkrishan (PW-2) had deposed in his cross examination that he reached at Chauki at 3:30 PM and remained there for 10 minutes. The time of recovery has been alleged at 5:20 PM. The A.G.A. refuted the contention. The statement of I.P. Anant Ram Singh (PW-5) clearly reveal that the place of incident is 2 ½ KM from the check-post Majola. Meaning thereby the witness came from Khatima to police chauki at 3:30 PM and after 10 minutes he went to the place of incident which is 2 ½ KM away from the police outpost. This fact further stands corroborated by G.D. No. 32 (Ex.ka.3) in which it has been indicted that Constable Balkrishan had arrived at the police station at about 3:30 PM. The cross examination of Constable Balkrishan (PW-2) further reveal that the appellant has not put any suggestion to Constable Balkrishan (PW-2) that he was not present at the spot at the time of incident. Thus, the contention of the learned Amicus Curiae is not tenable.

9. The learned Amicus Curiae has contended that there was total non-compliance with the requirements of Section 50 of the Act which had vitiated the seizure of the contraband. Section 50 contains the conditions under which search of a person shall be conducted. The learned A.G.A. refuted the contention. In the instant case, S.I. Virendra Kumar (PW-1) and Constable Balkrishan (PW-2) were checking the vehicles and the suspected persons at the barrier. There was no prior information that the appellant was coming to the place with Charas. The appellant was searched during the normal course of investigation into suspected offence. During the search the appellant informed that he had the Charas. Immediately thereafter he was informed of his right of being search before a Magistrate or Gazetted Officer under section 50 of the Act but he declined that offer. In the instant case, the prosecution has proved the evidence of Virendra Kumar (PW-1) and Constable Balkrishan (PW-2) that the appellant was informed about his right as contemplated under section 50 of the Act. It is also well settled position of law that if an accused person on seeing patrolling police party starts running which excites the suspension of the police party as a result of which he is

apprehended and searched the question of compliance with the safeguards prescribed under section 50 of the Act would not arise. {**State of Punjab Vs. Balbir Singh 1994 (3) SCC p/229}.**

In view of the above decision the contention of the learned Amicus Curiae is not tenable.

10. It was further contended by the learned Amicus Curiae that the prosecution has not taken any public witnesses during the recovery of Charas. The learned Amicus Curiae has referred the statement of Constable Balkrishan (PW-2) who stated in his cross examination that when the appellant was apprehended by the police 10-15 people had come there and further contended that it is public place. The learned A.G.A. refuted the contention. Virendra Kuamr (PW-1) and Constable Balkrishan (PW-2) stated that many people came at the place of occurrence and they were asked to be the witnesses of the recovery but none came forward to be the witness. The entire evidence of the prosecution with regard to the recovery cannot be doubted or discarded merely on the ground that he happens to be an official but as a rule of caution and dependent upon the circumstances of the case, the courts look for independent corroboration. This again depends on the question whether the official has deliberately failed to comply with these provisions or failure was due to lack of time and opportunity to associate some independent witnesses with a search and strictly comply with these provisions. The failure to associate the independent witness in a situation like this would not affect the prosecution case in toto and the same cannot be thrown out or doubted on that ground alone. Thus the arguments of the learned Amicus Curiae is not tenable.

11. The learned Amicus Curiae has lastly submitted that in the instant case the provision of section 41 & 42 NDPS Act have not been complied with. The provisions of the section 41 & 42 NDPS Act would not be attracted when the police had no prior information as contemplated under section 42 of the Act and make a search or arrest of the accused during the normal course of investigation. On completion of such search a contraband under the N.D.P.S. Act is recovered it is not necessary to record the reason prior to the search. It thus emerges that when the police,

while acting under the provisions of Cr.PC as empowered therein and while exercising surveillance or investigation into other offences, had to carry out the arrests or searches they would be acting under the provisions of Section 100 or 165 Cr.PC that by itself cannot be a ground to reject the prosecution case outright.

12. However, during the trial the witnesses were cross examined at length by the defence but the testimony of the prosecution witnesses were remained unshaken. The defence has not put any animosity against the police officers.

13. In view of the forgoing discussion, it is evident that the evidence of the prosecution witnesses is credible and cogent and therefore the learned Sessions Judge was fully justified in coming to the conclusion that the charge against the appellant was establishment beyond doubt.

14. The appeal is dismissed. The conviction and sentence of the appellant as recorded per judgment and order dated 3.10.2001 under sections 20 of the N.D.P.S. Act are affirmed.

(J.C.S. Rawat, J.)

(LSR)